

FORMAL OPINION NO. 22\*

The Committee has been asked:

May counsel for a plaintiff ethically question either the directors or the officers, or the employees of a defendant corporation about the subject matter of a lawsuit?

Canons 9 and 39 of Professional Ethics are involved. The first of these reads in part:

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." (Emphasis supplied.)

Canon 39 provides:

"A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel for party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand."

It is difficult to divorce the corporation (which is represented by counsel) from its officers and directors. Their identity of interest may not readily nor properly be ignored.

Since, under the new Rules of Civil Procedure, there are readily available tools of discovery (depositions, interrogatories, and production of documents), it is our opinion that questioning of defendant's officers or directors without the consent or presence of its counsel would contravene the letter and spirit of Canon 9. With such consent or in consonance with the Rules of Civil Procedure, such interrogation would be appropriate. See Opinions 108 and 187 of the Committee on Professional Ethics & Grievances, American Bar Association.

Employees of the defendant corporation occupy a contrasting status. They are not the alter ego of the company, nor are they (ordinarily) represented by counsel. In carrying out his duty to ascertain the facts, the plaintiff's attorney may properly "interview any witness or prospective witness (other than the party) for the opposing side in any civil or criminal action without the consent of opposing counsel or party." (Canon 39, supra.) See also, Opinion 117 of Committee on Professional Ethics and Grievances, American Bar Association.

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\*This is an undated opinion. See, DR 7-104(1), Idaho Code of Professional Responsibility.